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In The

Supreme Court of the United States

COURT OF INDIAN OFFENSES OF THE CHOCTAW NATION and JAMES WOLFE, MAGISTRATE,

Petitioners,

v.

DOUGLAS DRY, ROSIE BURLISON, and JUANITA McCONNELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for purposes of habeas corpus review, "detention," as used in the Indian Civil Rights Act of 1968 (codified in relevant part at 25 U.S.C. § 1303), is synonymous with "in custody," as the latter phrase is employed in 28 U.S.C. § 2241?

2. If not, whether individuals released on their own recognizance by a tribal court pending trial for violations of tribal law, whose movements are in no way restricted prior to their (hypothetical) future conviction and imposition of sentence, and absent any special circumstances, are under "detention" within the meaning of 25 U.S.C. § 1303?

3. If "detention" and "in custody" are synonymous, whether under this Court's current caselaw individuals released on their own recognizance by a tribal court pending trial for violation of tribal law, whose movements are in no way restricted prior to their (hypothetical) future conviction and imposition of sentence, and absent any special circumstances, are "in custody" for purposes of federal habeas corpus review?

4. If so, whether *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), and its progeny should be overruled insofar as those cases hold that they are?

5. Whether, despite the fact that the habeas corpus petitions at issue are the *first* such petitions, "abuse of the writ" should be found where, as here, the theory upon which those petitions rely has already been rejected in numerous decisions of state, federal, and tribal courts following years of protracted pretrial litigation by the habeas corpus petitioners?

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The Opinion and Order of the United States Court of Appeals for the Tenth Circuit as to which certiorari is sought is reported at 168 F.3d 1207 (10th Cir. 1999), and reprinted as Appendix A to this Petition.

The Minute Order of the United States District Court for the Eastern District of Oklahoma dismissing Respondents' Petitions for Habeas Corpus, which is unreported, is reprinted as Appendix L to this Petition.

The Minute Order of the Court of Indian Offenses for the Choctaw Nation denying Respondents' criminal-jurisdiction-challenging Motion to Dismiss will be reported at 5 OKLAHOMA TRIBAL COURT REPORTS 225 (Choctaw CIO 1997), and is reprinted as Appendix C to this Petition.

The Minute Orders of the Court of Indian Offenses of the Choctaw Nation releasing Respondents on their own recognizance, which are unreported, are reprinted as Appendices D through F of this Petition.

A related Opinion and Order of the Tribal Court of the Choctaw Nation (which will be referenced as authority herein) will be reported at 5 OKLAHOMA TRIBAL COURT REPORTS 195 (Choctaw Trib. Ct. 1996), and is reprinted as Appendix G to this Petition.

An Opinion and Order of the Court of Indian Offenses (Appellate Division) for the *Chickasaw* Nation (from which Respondents unsuccessfully sought relief from the Order of the Court of Indian Offenses for the *Choctaw* Nation reprinted as Appendix C) will be reported at 5 OKLAHOMA TRIBAL COURT REPORTS 307 (Chickasaw CIO-App. 1997), and is reprinted as Appendix H to this Petition.

Unreported opinions and orders in related litigation involving the parties from various state and federal courts are reprinted as Appendices I through L to this Petition.

JURISDICTIONAL STATEMENT

The Opinion and Order of the United States Court of Appeals for the Tenth Circuit was filed on February 22, 1999. The decision of the United States District Court that the Court of Appeals reversed dismissed Respondents' Petitions for Habeas Corpus on the ground that it lacked jurisdiction based on 25 U.S.C. § 1303 (1994) and 28 U.S.C. § 2241 (1994). This Court has jurisdiction to review the Court of Appeals' decision pursuant to 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The full texts of 25 U.S.C. § 1303 (1994) and 28 U.S.C. § 2241 (1994) are reprinted as Appendix M to this Petition.

The full text of Choctaw Nation Council Bills CB 138-91 (1991) and CB 111-92 (1992) are reprinted as Appendix N to this Petition.

CONSTITUTIONAL PROVISION INVOLVED

The full text of Article XIII of the Constitution of the Choctaw Nation of Oklahoma is reprinted as Appendix O to this Petition.

STATEMENT OF THE CASE

Procedurally, the instant case comes before this Court following a Court of Appeals' reversal of a United States District Court's dismissal of Respondents' petitions for habeas corpus, the dismissals having been based on the ground that Respondents were not under "detention" within the meaning of Title II, Section 203 of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1303 (1994), and/or "in custody" within the meaning of the general federal habeas corpus statute, 28 U.S.C. § 2241 (1994).

Petitioners herein are the Court of Indian Offenses of the Choctaw Nation of Oklahoma[1] and the Magistrate of that Court. Respondent Dry is an attorney and a member of the Choctaw Nation of Oklahoma; Respondents Burlison and McConnell are also members of the Choctaw Nation of Oklahoma.

On September 4, 1995, Respondents were arrested during an altercation between them and tribal police officers[2] during the Choctaw Nation's Labor Day Festival on tribal lands near Tuskahoma, Oklahoma. Various Respondents stand charged in the Court of Indian Offenses with a number of tribal-law misdemeanor violations, including Disturbing the Peace, Disturbance of a Parade, Assault on a Police Officer, Attempting to

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[1] Courts of Indian Offenses are sometimes colloquially referred to as "CFR courts," since the authority for their establishment is found in 25 C.F.R. pt. 11 (1998).

[2] This Court will not be surprised to learn that the facts surrounding that altercation are disputed, but the competing versions of that incident are irrelevant for purposes of this Petition.

Intimidate an Officer, and Resisting Arrest.[3] (For reasons that will become apparent, those charges have yet to come to trial.) On arraignment later on September 4, 1995, each Respondent was released, without condition, on his or her own recognizance. *Infra* Appendices D through F; *see also infra* at 24-25 n.19.

By Motion to the Court of Indian Offenses, Respondents challenged its criminal jurisdiction over them, urging that by rejecting a proposed 1983 amendment to the Choctaw Constitution that would have provided the *Tribal* Court of the Choctaw Nation (a tribunal established be the Choctaw Constitution, and occasionally known colloquially as the "Constitutional Court"[4]) with plenary civil and criminal jurisdiction, the Nation's voters had stripped the Nation of all criminal jurisdiction over its members. While the Motion to Dismiss was pending before the Court of Indian Offenses, various tribal officials and citizens sought declaratory relief (inter alia) from the Tribal [Constitutional] Court, seeking a declaration that the Nation had *not* divested itself of criminal jurisdiction over tribal members, and that the tribal legislation pursuant to which the Nation had contracted with the United States for the operation of the Court of Indian Offenses of the Choctaw Nation (and the Appellate Division of that Court)[5] was consistent with the Choctaw Constitution. The Tribal [Constitutional] Court granted

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[3] The penalty for conviction on any of those charges are limited by federal law to one year's imprisonment and/or a $5000 fine. 25 U.S.C. § 1302(7) (1994).

[4] See *infra* Appendix O (reproducing Article XIII of the Choctaw Nation's Constitution, which establishes the jurisdiction of that Court).

[5] See *infra* Appendix N (reproducing that legislation).

the requested relief on December 3, 1996, *infra* Appendix G, and Respondents' Motions to Dismiss the criminal complaints were denied by the Court of Indian Offenses on January 24, 1997, *infra* Appendix C.

Rather than proceeding to trial, Respondents pursued a far-flung litigation strategy in an attempt to evade trial on the pending criminal charges. One prong of that strategy (which remains incomprehensible to Petitioners) took the form of an attempt to secure a Writ of Prohibition from the Appellate Division of the Court of Indian Offenses for the *Chickasaw* Nation; unsurprisingly, that Court denied jurisdiction over the matter. *Infra* Appendix H.

A second prong of that strategy involved a tribal-constitutional-law-premised *state*-court suit brought by Respondent Burlison's husband (represented by Respondent Dry as counsel) against the Governor of Oklahoma, four Oklahoma municipalities (and their police departments), three Oklahoma counties (and their sheriffs' departments), the Choctaw Nation, and the Bureau of Indian Affairs. *See* Appendix I. That challenge, too, was unsuccessful, with the Oklahoma district court, inter alia, granting comity to the decision of the Tribal [Constitutional] Court interpreting the Tribe's own constitution. *See infra* Appendix J, at J-6 – J-11; *see also infra* Appendix K (reproducing decision of Oklahoma Court of Civil Appeals affirming both the district court's conclusion and its rationale).

The third prong of Respondents' strategy manifested itself in a seventeen-count federal-court suit (based, inter alia, on *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983 (1994)) brought by the instant Respondents against the United States of America, thirty federal and tribal officials (reaching up to the Secretary of the Interior), and two Oklahoma municipalities, once

again ultimately based on their by-now oft-repudiated tribal-constitutional-law-based theory. *See infra* Appendix L, at L-8 – L-10. Once again, that theory was rejected, *infra* at L-11 – L-13, with every count of the complaint being dismissed against every defendant (in every capacity) who requested dismissal at the Rule 12 stage.[6]

Having by this point failed to secure relief in lawsuits in the courts of the United States, the State of Oklahoma, and *two* Indian tribes against the United States of America, the Bureau of Indian Affairs, three Oklahoma municipalities, six Oklahoma counties, and thirty-one federal, state, tribal, and municipal officials (including the Governor of Oklahoma and a member of the President's Cabinet) *prior to trial* on the pending tribal misdemeanor charges (as to which they were released without condition, on their own recognizance), Respondents sought federal habeas corpus relief. Without reaching the issue of whether Respondents' thus-far successful attempts to evade trial[7] constituted a failure-to-exhaust,[8] the United States District Court for the Eastern District of Oklahoma dismissed

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[6] The United States District Court for the Eastern District of Oklahoma effectuated that result in seven Orders filed September 30, 1998. Since those Opinions and Orders, which are somewhat lengthy, are parallel in all material respects, only one of them is reproduced as an Appendix to this Petition. See *infra* Appendix L.

[7] Demonstrating the patience of Job, the Court of Indian Offenses has stayed proceedings pending conclusion of the welter of state-court and federal-court litigation. *Cf. Dry*, 168 F.3d at 1208 n.2, *infra* Appendix A, at A-3 n.2 (limiting its observation to the pending habeas petitions).

[8] *See Dry*, 168 F.3d at 1209, *infra* at A-3 – A-4. Because the Court of Appeals therefore did not reach those issues either, "exhaustion" issues are not now properly before this Court.

Respondents' petitions on the ground that under the circumstances, they were neither under "detention" within the meaning of 25 U.S.C. § 1303 (1994) nor "in custody" within the meaning of 28 U.S.C. § 2241 (1994). *See infra* Appendix B, at B-1. The Court of Appeals reversed. *Dry*, 168 F.2d 1207, *infra* Appendix A.

Because the 25 U.S.C. § 1303 issue presents an important federal question that has not been, but should be decided by this Court; because insofar as the Court of Appeals' decision is based on 28 U.S.C. § 2241, it stretches the "in custody" requirement of that statute to an extent never before countenanced by this Court in the pretrial context; and because this case presents this Court with the opportunity to clarify whether and when a *first* habeas corpus petition may be abusive (and thereby provide lower federal courts with guidance regarding the appropriateness of discretionary decisions to withhold the Writ of Habeas Corpus even though possessed of the power to grant it), Petitioners respectfully request a Writ of Certiorari from this Court. It should go without saying that in the present posture of this case, Petitioners cannot and do not present this Court with any issue concerning the jurisdiction of the Court of Indian Offenses or of Choctaw constitutional law.

REASONS FOR GRANTING THE WRIT

I. WHETHER "DETENTION BY ORDER OF AN INDIAN TRIBE" (AS THAT PHRASE IS EMPLOYED IN 25 U.S.C. § 1303) IS SYNONYMOUS WITH "IN CUSTODY" (AS THAT PHRASE IS EMPLOYED IN 28 U.S.C. § 2241) IS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

As this Court is well aware, almost from the very beginning of the increasingly-expansive approach to 28

U.S.C. § 2241's "in custody" requirement that it commenced in the 1960s, *see, e.g., Jones v. Cunningham*, 371 U.S. 236 (1963) (holding that a parolee is "in custody" for § 2241 purposes); *Peyton v. Rowe*, 391 U.S. 54 (1968) (overruling *McNally v. Hill*, 293 U.S. 131 (1934), and holding that a prisoner serving consecutive sentences is "in custody" under any of those sentences); *Carafas v. LaVallee*, 391 U.S. 234 (1968) (overruling *Parker v. Ellis*, 362 U.S. 574 (1960), and holding that once federal habeas jurisdiction has attached, it is not defeated by the habeas petitioner's unconditional release); *Strait v. Laird*, 406 U.S. 341 (1972) (holding, inter alia, that an army reservist ordered to report for active duty was "in custody" for § 2241 purposes); *Braden v. 30th Judicial District of Kentucky*, 410 U.S. 484 (1973) (overruling *Ahrens v. Clark*, 335 U.S. 188 (1948), and holding that a person imprisoned in one state was constructively "in custody" in another for purposes of challenging a sentence yet to be served there); *Hensley v. Municipal Court*, 411 U.S. 345 (1973) (holding that a habeas petitioner who had been released on his own recognizance pending execution of sentence was "in custody" for § 2241 purposes), individual Justices, in both dissents *and* concurring opinions, have wondered where, if anywhere, the erosion of the "in custody" requirement would stop. *See, e.g., Strait*, 405 U.S. at 346 (Rehnquist, J., dissenting) ("The Court today . . . stretches the concept of custody beyond anything contained in any of our previous decisions. . . . "); *Braden*, 410 U.S. at 501 (Blackmun, J., concurring in the result) (citation omitted) ("[W]e have come a long way from the traditional notions of the Great Writ. The common-law scholars of the past hardly would recognize what the Court has developed, and they would, I suspect, conclude that it is not for the better."); *Hensley*,

411 U.S. at 354 (Blackmun, J., concurring in the result) ("[T]he Court seems now to equate custody with almost any restraint, however tenuous. One wonders where the end is.").

The point that modifications in the law often generate opposition is neither insightful nor noteworthy. Petitioners respectfully submit, however, that the ancillary point they will make in Proposition III of this Petition – that lower-federal-court decisions subsequent to *Hensley* and its progeny have expanded the "in custody" concept, essentially unchecked, to an extent never endorsed by this Court – *is* worthy of note. In this Proposition, Petitioners will make precisely the same point with respect to the "detention" requirement imposed by the "tribal-court" habeas corpus statute, 25 U.S.C. § 1303.

Perhaps the only difference between the 25 U.S.C. § 1303 context and the one presented by 28 U.S.C. § 2241 is that in the former situation, this Court today has the opportunity to evaluate what promises to be an inexorable lower-federal-court slide down the slippery slope at an early stage of the process.

Although only once during the first decade of 25 U.S.C. § 1303's existence[9] did a Section 1303 issue reach a Court of Appeals, *see Tom v. Sutton*, 533 F.2d 1101 (9th Cir. 1976), this Court's 1978 holding that Section 1303 provided the *only* federal-court remedy for violations of the Indian Civil Rights Act [hereinafter "ICRA"], *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60-72 (1978),

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[9] Section 1303 was adopted as Title II, Section 203 of the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 78.

substantially increased the visibility of that provision.[10] But despite the enhanced prominence of the "tribal-court" habeas corpus statute, Section 1303 also generated little federal caselaw during the following decade: the second case in which a Court of Appeals addressed its consequences was decided in 1988. See *Greywater v. Joshua*, 846 F.2d 486 (8th Cir. 1988). *See also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 884-85 (2d Cir.), *cert denied*, 519 U.S. 1041 (1996) ("We have discovered few cases in which habeas jurisdiction has actually been invoked under § 1303, and even fewer examining the jurisdictional prerequisites of § 1303.").

During the most recent decade of Section 1303's existence, *Poodry* reached the Second Circuit. In that case, a divided Second Circuit panel held that under the sui generis circumstances involved therein, *cf. Poodry*, 85 F.3d at 879 (noting that the case was one of first impression), "banishment" was effectively a criminal sanction subject to habeas corpus review. *Id.* at 888. And given the severe consequences of the "banishment," *see id.* at 878, the *Poodry* majority found that the habeas petitioners were under "detention" within the meaning of Section 1303, *id.* at 895-97. In so doing, it "reject[ed] the *petitioners'* argument that the habeas provision of the ICRA, 25 U.S.C. § 1303, was intended to have *broader* reach than cognate

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[10] "*Santa Clara Pueblo* obviously does not speak directly to the scope of [25 U.S.C. § 1303's] habeas provision, which was a matter not raised in that case." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 887 (2d Cir.), *cert. denied*, 519 U.S. 1041 (1996). Nor, for that matter, does *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which this Court granted certiorari only "to decide whether Indian tribal courts have criminal jurisdiction over non-Indians," *id.* at 195.

statutory provisions governing collateral review of state and federal action." *Id.* at 879-80 (emphasis added); *see also id.* at 889-93.

In the decision as to which Petitioners seek certiorari herein, the Tenth Circuit, in a footnote, cited *Poodry* for the proposition that "detention" (within the meaning of Section 1303) and "in custody" (within the meaning of 28 U.S.C. § 2241) impose identical requirements, *see Dry*, 168 F.3d at 1208 n.1, *infra* Appendix A, at A-2 n.1, though no argument was made in *Poodry* that "detention" was a *narrower* category than "custody" (as lower federal courts have interpreted that § 2241 requirement subsequent to *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984)). Moreover, while the *Poodry* majority treated the habeas petitioners' banishment as the functional equivalent of a criminal *conviction*, 85 F.3d at 879 ("We . . . conclude that the orders of permanent banishment constitute punitive sanctions imposed for allegedly criminal behavior."), the Tenth Circuit concluded (based upon 28 U.S.C. § 2241 caselaw and a reversed Ninth Circuit Section 1303 case) that Section 1303's "detention" requirement had been satisfied by the instant Respondents, who are currently unconditionally released pending trial. *Dry*, 168 F.3d at 1208-09, *infra* Appendix A, at A-2 – A-3. In no unreversed decision has a Court of Appeals ever before reached such a conclusion.[11]

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[11] In *Tom*, for example, the Ninth Circuit expressly noted at the outset that the habeas petitioner had pled guilty, been sentenced, and filed his petition while incarcerated. 533 F.2d at 1102. And in *Poodry*, a majority of the Second Circuit panel held the "banishment" to be the equivalent of a criminal conviction. 85 F.3d at 879. In *Greywater*, the Eighth Circuit reversed a district court decision dismissing a habeas petition brought by tribal

It requires no great foresight on Petitioners' part to predict with some confidence that in short order, another circuit will cite *Dry* for the propositions that the meaning of "detention" and "in custody" are synonymous, and that a Section 1303 habeas remedy may be had by a personal-recognizance-released criminal defendant prior to being tried by a tribal court. It is with cases such as *Dry*, in short, that slippery slopes are almost casually lubricated.

But as modern tribal courts exercise criminal jurisdiction over their members (and after 1990, other Indians, *see* 25 U.S.C. § 1301(2) (1994)) with increasing frequency, the meaning of "detention" for Section 1303 purposes becomes increasingly critical. In the following Proposition, Petitioner will demonstrate that weighty textual, contextual, historical, and policy considerations counsel both against reading "detention" and "in custody" as synonymous, and against adopting the corollary proposition that all persons released on their own recognizance prior to trial by a tribal court may seek federal habeas corpus relief. What is important for purposes of *this* Proposition, however, is the significance of those issues' definitive resolution, both to provide guidance to lower federal courts and to facilitate the effective administration of justice in tribal courts.

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nonmembers where there were "strong grounds in the record to suggest that Petitioners did not receive a fair hearing in the Tribal Court on their Motions to Dismiss," 846 F.2d at 489, but the Tribe did not contest the "detention" issue in that case. *Cf. infra* at 13-14 n.12 (noting that the habeas petitioner in *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965) – a pre-ICRA case on which the drafters of 25 U.S.C. § 1303 relied – had also been criminally convicted and incarcerated).

II. POWERFUL TEXTUAL, CONTEXTUAL, HISTORICAL, AND POLICY CONSIDERATIONS SUPPORT THE CONSTRUCTION OF 25 U.S.C. § 1303's "DETENTION" LIMITATION AS A MORE STRINGENT PRECONDITION THAN THE "IN CUSTODY" REQUIREMENT OF 28 U.S.C. § 2241.

Petitioners are aware that a Petition for Certiorari is not the appropriate venue for a full briefing of the issues on the merits. Nevertheless, if only to demonstrate that it is prepared to adduce powerful evidence in support of the distinction it proffers to this Court, Petitioners will briefly sketch out four lines of argument in support of that distinction.

First, as a wholly textual matter (and to cite but one source with which the 1968 drafters of Section 1303 would presumably have been familiar), while the dictionary definition of "detention" includes "custody," "custody" in that definition is used in its ordinary-language, *physical* custody sense. *E.g.*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 393 (unabridged ed. 1966).[12]

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[12] To the extent that the *Poodry* majority relied on a footnote in a law review article to support the proposition that the "detention" requirement of 25 U.S.C. § 1303 "closely tracks the language of *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), a case frequently invoked with approval during the 1965 hearings," *Poodry*, 85 F.3d at 891; *cf. id.* (citing Donald L. Burnett, Jr., *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557, 602 n.240 (1972), in support of the proposition "that § 1303 reflected incorporation of the *Colliflower* formula"), that Court failed to note that the *Colliflower* formula employed "detention" and *"imprisonment"* interchangeably. *Compare Colliflower*, 342 F.2d at 379 ("[W]e think that . . . it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the *detention* of

Moreover, since Congress is presumed to be familiar with the current state of the law, *e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); since this Court began its move away from a *physical* custody interpretation of 28 U.S.C. § 2241

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an Indian pursuant to an order of an Indian court." (emphasis added)) *with id.* at 377 ("No case has been cited to us that holds that the courts of the United States do not have jurisdiction to issue writs of habeas corpus to inquire into the legality of the *imprisonment* of an Indian pursuant to an order or judgment of an Indian court." (emphasis added)). Had the *Poodry* majority more carefully examined the footnote on which it relied, it would have discovered that that footnote, *see* Burnett, *supra*, at 602 n.240, concluded with a reference to *another* part of the article, in which the author quite clearly noted that *Colliflower* authorized only *post*conviction relief. *See id.* at 592 n.201 ("*Colliflower* appeared to authorize the issue of writs of habeas corpus only in criminal cases *tried* by courts of Indian offenses. . . . (emphasis added)); *see also id.* at 593 (characterizing *Colliflower* as authorizing "*limited* review [of Court of Indian Offenses decisions] under the federal habeas corpus statute" (emphasis added)); *cf. id.* (noting that a 1965 *Colliflower*-analagous Senate Bill authorized only "appeals of criminal *convictions* from tribal courts to federal district courts" (emphasis added)). And had the Second Circuit majority perused more recent law review articles on the subject, it would have discovered one by Professor Robert Laurence, who stated flatly in 1992: "Section 1303 contains an entitlement to petition the federal courts in habeas corpus to challenge tribal court *incarceration* alleged to be in violation of the ICRA." Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. Rev. 657, 658 n.9 (1992) (emphasis added). Insofar as the *Colliflower* issue is concerned, this is no mere quibble, but is rather as fundamental a flaw in the Second Circuit majority's historical analysis as can be imagined.

Madeline Colliflower, it may be noted, *was* imprisoned – under the custody of Respondent John Garland, Sheriff of Blaine County, Montana. *Colliflower*, 342 F.2d at 371.

five years *before* the enactment of 25 U.S.C. § 1303, *see Jones v. Cunningham*, 371 U.S. 236 (1963); and since ("custody" having then been the general habeas touchstone for over a century) Congress may be presumed to have been aware that it could have employed that term were its intent that of creating parallelism between Sections 1303 and 2241, its decision to select a different term for Indian-court federal habeas cases should not be presumed to have been accidental.

Second, the legislative history of what became Section 1303 reveals that it was viewed by its drafters exclusively as a *post*-conviction remedy. *Cf.* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557, 592-94 (1972) (discussing a 1965 incarnation of what would become the ICRA, and more specifically a 1965 Senate Bill that authorized de novo appeals of criminal *convictions* from tribal to federal courts);[13] *Santa Clara Pueblo*, 436 U.S. at 67-68 (same); S. 962, 89th Cong., 1st Sess., 111 Cong. Rec. 1800 (1965) (reproducing the text of that proposal).[14] By 1967, the de novo review provisions had been softened to circumstances in which the federal district court found

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[13] This Court will discover that the published legislative history of the ICRA fails to note the deletion of that proposal from the Act as finally adopted, *see* 1968 U.S.C.C.A.N. 1837, 1865, but in so doing further evidences the criminal-*conviction* oriented thrust of the ICRA's sole remedial component, *id.*

[14] "In addition, . . . the Department of the Interior had [proposed] . . . a substitute bill that would have permitted the Secretary of the Interior of adjudicate civil complaints concerning tribal actions, with ultimate review . . . by federal courts. That approach was also rejected." *Poodry*, 85 F.3d at 886-87 (citation omitted).

reasonable cause to believe that the convicted individual had been deprived of rights guaranteed by the ICRA, and the habeas provisions permanently added; the proposal for direct appeal of tribal criminal convictions under *any* circumstances was then deleted from the version as enacted. *Santa Clara Pueblo*, 436 U.S. at 67-68. Indeed, it would be over *fifteen years* following the enactment of 25 U.S.C. § 1303 that 28 U.S.C. § 2241-based habeas petitions would become cognizable for personal-recognizance-released criminal defendants prior to trial – and even then, only in a context of the "unique . . . double jeopardy right." *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 302 (1984). Whether or not the 90th Congress (which enacted Section 1303) could have foreseen that Section 2241's "custody" requirement would be subsequently relaxed to encompass pre-trial personal-recognizance "custody" (whether or not limited to the Double-Jeopardy Clause) in selecting "detention" rather than "custody" as Section 1303's precondition, it cannot be presumed that that Congress intended to incorporate future Section 2241 interpretations when it enacted Section 1303.[15]

Third, while federalism considerations are obviously implicated in federal habeas review of state criminal proceedings, the comity-oriented consequences implicated

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[15] "Only a few tribes had an opportunity to comment on the ICRA in its final form, since the House held only one day of hearings on the legislation. The Pueblos of New Mexico . . . argued that the habeas corpus provision of § 1303 'opens an avenue through which Federal courts, lacking knowledge of our traditional values, customs, and laws, could review and offset the decisions of our tribal councils.' " *Santa Clara Pueblo*, 436 U.S. at 70 n.30 (citations omitted).

by federal habeas review of tribal-court decisions are different. *See., e.g., Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (discussing the sovereign-immunity consequences of the distinction); *United States v. Wheeler*, 435 U.S. 313, 326-30 (1978) (holding that the exercise of criminal jurisdiction by tribes over tribal members stems from a sovereignty independent of both the states and the United States); *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that exercises of tribal sovereignty are not bound by the United States Constitution); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (noting the continued existence of tribes as "district, independent political communities"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (finding a "guardian/ward" relationship between the United States and Indian tribes). One consequence of the tribes' unique status is the existence of canons of construction mandating the interpretation of statutes whose meanings are ambiguous in the light most preservative of tribal sovereignty. *E.g., Santa Clara Pueblo*, 436 U.S. at 60 (ellipses and brackets in original) (invoking "considerations of 'Indian sovereignty . . . [as] a backdrop against which the applicable . . . federal statut[e] must be read' " (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973))); *Poodry*, 85 F.3d at 889 ("[W]e are required to construe ambiguity in statutes in favor of preserving Indian sovereignty." (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982))). Especially in light of the policy considerations discussed in the following two paragraphs, Petitioners will (and do) maintain that those canons further buttress the proposition that for habeas corpus purposes, "detention" should be assigned a narrower meaning than this Court (and especially lower

federal courts) have assigned to the words "in custody" after the ICRA's enactment.

Fourth, in *Santa Clara Pueblo*, this Court recognized that "[t]wo distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.' " 436 U.S. at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). In rejecting the invitation to infer an independent federal civil claim to enforce the ICRA's substantive guarantees, the *Santa Clara Pueblo* Court continued:

> Where Congress seeks to promote dual objectives in a single statute, courts must be . . . hesitant to . . . serv[e] one legislative purpose [while] disserv[ing] the other. Creation of a federal cause of action for the enforcement of rights created in Title I [of the ICRA], however useful it might be in securing compliance with [25 U.S.C.] § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, but it would also impose serious financial burdens on already financially disadvantaged tribes.

436 U.S. at 65 (citation and internal quotation marks omitted). It is appropriate to note at this juncture that in subsequent legislation, Congress further strengthened the "self-determination" half of the two competing ICRA policies. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n (1994 & Supp. 1998)) [hereinafter "Self-Determination Act"].

To come quickly to the point, there is no "free lunch" to be had in choosing whether to construe Section 1303's "detention" requirement jot-for-jot with the caselaw that construed 28 U.S.C. § 2241 years after Section 1303's enactment: that calculus involves a zero-sum game. To be sure, such a construction would enhance the "individual rights" component of the ICRA's competing policies – but only at the cost of depreciating the competing "tribal-self-determination" ICRA [and Self-Determination Act] congressional policy. Since it is not the courts, however, but *Congress* that plays the lead federal role in Indian affairs, *see, e.g., Santa Clara Pueblo,* 436 U.S. at 56 (noting one consequence of the longstanding "plenary power" doctrine), Petitioners respectfully submit that the balancing *Congress* did in 1968 should be dispositive in weighing the competing policy interests in question. This Court's (and more so, lower federal courts') interpretations of 28 U.S.C. § 2241's "custody" requirement, made well after the enactment of 25 U.S.C. § 1303, should therefore be irrelevant to the proper construction of the latter section – one way *or* the other.

III. LOWER-FEDERAL-COURT DECISIONS SUBSEQUENT TO *JUSTICES OF BOSTON MUNICIPAL COURT v. LYDON,* 466 U.S. 294 (1984), HAVE ERODED 28 U.S.C. § 2241's "CUSTODY" REQUIREMENT FAR BEYOND ANYTHING EVER COUNTENANCED BY THIS COURT.

The sequence of cases decided between 1963 and 1973 in which this Court relaxed the "in custody" requirement of 28 U.S.C. § 2241 has been noted earlier in this Petition, *supra* at 8, and will not be rehearsed at this point. Suffice it to say that even cumulatively, insofar as

persons released on their own recognizance were concerned, only *Hensley v. Municipal Court*, 411 U.S. 345 (1973), had found "custody" for habeas corpus purposes, and there only after the habeas petitioner had been convicted. Even that result was reached over the votes of three Justices, *see id.* at 354 (Rehnquist, J., dissenting), and with Justice Blackmun's notably reluctant concurrence, *id.* at 353 (Blackmun, J., concurring in the result).

Moreover, Justice Brennan's majority opinion went to great lengths to emphasize that habeas corpus is a writ reserved for "*severe* restraints on individual liberty," with its "use . . . limited to cases of *special* urgency," *Hensley*, 411 U.S. at 351 (emphasis added). Applying those principles, this Court noted that not only had Kirby Hensley been subjected to restraints "not shared by the public generally," *id.* (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)), but that, having been released after conviction and sentencing but prior to *execution* of sentence, "[h]is incarceration is not . . . a speculative possibility," *Hensley*, 411 U.S. at 351-52. Finally, the *Hensley* Court also emphasized that to authorize habeas at that stage of the proceedings would not "interfere with any significant of the State," since the petitioner would no doubt petition for habeas after his incarceration in any event. *Id.* at 352.

A decade later, this Court decided *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984) [hereinafter *"Boston Municipal Court"*]. Because that case involved a sui generis state appellate procedure,[16] it is inconceivable

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[16] This Court summarized that procedure as follows:

> Under Massachusetts law, a defendant charged with certain crimes in Boston Municipal Court may elect either a bench trial or a jury trial. If a defendant

to Petitioners that this Court could have foreseen that that decision (which found the habeas petitioner "in custody" while released on his own recognizance *after* conviction and sentencing but while automatically entitled to a trial de novo under Massachusetts law, and created a "special purpose" double-jeopardy exception to habeas exhaustion requirements, *see id.* at 340 (O'Connor, J., concurring in the judgment), would become the lynchpin of a subsequent wholesale erosion of 28 U.S.C. § 2241's "custody" requirement in the lower federal courts. (To take just one example, this Court will discover that *Boston Municipal Court* provided the pivotal citation to this Court's caselaw invoked by the Tenth Circuit in deciding that the Respondents are in the "custody" of Petitioners in this case. *See Dry*, 168 F.3d at 1208, *infra* Appendix A, at A-3.)

As in *Hensley*, the *Boston Municipal Court* Court provided ample textual bases to caution lower federal courts that that case was unsuitable for deployment as a "wild card" by persons released on their own recognizance prior to trial. It began by construing *Hensley* – precisely as

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> chooses a jury and is convicted, he has the normal appellate process open to him, while a defendant dissatisfied with the results of a bench trial, if he elects that course, has an absolute right to trial de novo before a jury. A convicted defendant who has chosen a bench trial need not allege error at that trial to obtain de novo review. On the other hand, he may not rely upon error at the bench trial to obtain reversal of his conviction; his only recourse is a trial de novo.

Boston Municipal Court, 466 U.S. at 297 (citations and footnote omitted).

the instant Petitioners construe it.[17] It emphasized the "unique nature of the double jeopardy right" that Michael Lydon had asserted in that case. *Boston Municipal Court*, 466 U.S. at 302-03. It carefully enumerated the restraints on Lydon's liberty that it had implicitly found to be "severe."[18] Perhaps most noteworthy was the Court's express disclaimer of any intent to "ope[n] the door to the federal court to all persons prior to trial." *Id.* at 301-02 (bracketed material in original).

In light of subsequent lower-federal-court decisions reading *Boston Municipal Court* as a blanket invitation to find virtually any criminally-accused individual to be "in custody" for 28 U.S.C. § 2241 purposes (of which the decision of the Tenth Circuit below and the lower-federal-court cases it invokes reflect only the tip of the iceberg),

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[17] "In *Hensley v. Municipal Court*, we held that a petitioner enlarged on his own recognizance pending *execution* of sentence was in custody within the meaning of 28 U.S.C. §§ 2241(c)(3) and 2254(a)." *Boston Municipal Court*, 466 U.S. at 300 (citation omitted) (emphasis added).

[18] This Court summarized those restraints as follows:

> He is under an obligation to appear for trial and also "at any subsequent time as to which the case may be continued . . . and so from time to time until the final sentence." Failure to appear "without sufficient excuse" constitutes a criminal offense. Also, if Lydon fails to appear in the jury session, he may be required, without a further trial, to serve the two-year sentence originally imposed. Finally, the statute requires that he "not depart without leave, and in the meantime . . . keep the peace and be of good behavior."

Boston Municipal Court, 466 U.S. at 301 (citations omitted) (ellipses in original).

the premonition about slippery slopes expressed by Justice O'Connor in that case has proved prescient. With the benefit of hindsight, her suggestion that the issue in *Boston Municipal Court* be resolved by flatly holding "that a state criminal defendant is not 'in custody pursuant to a judgment of a State court' while he remains free from physical restraint and the State remains unable to impose such restraint without a further judicial hearing," 466 U.S. at 340 (O'Connor, J., concurring in the result) – would have prevented much of what Petitioners respectfully submit is nothing less than a lower-federal-court-generated trivialization of the Great Writ with respect to unconvicted criminal defendants released on their own recognizance prior to trial.

Decisions of this Court subsequent to *Boston Municipal Court* also support Petitioners' view that this Court does not view habeas corpus as just another pretrial motion. In *Maleng v. Cook*, 490 U.S. 488 (1989), for example, this Court had the opportunity to comment on its earlier decision in *Carafas v. LaVallee*, 391 U.S. 234 (1968). In so doing, it characterized the thrust of *Carafas* as follows:

> We went on to say . . . that the unconditional release raised a "substantial issue" as to the statutory "in custody" requirement. While we ultimately found that requirement satisfied as well, we rested that holding not on the collateral consequences of the conviction, but on the fact that the petitioner had been in *physical* custody under the challenged *conviction* at the time the petition was filed.

Maleng, 490 U.S. at 492 (citation omitted) (emphasis added). It went on to add that "[w]hile we have very

liberally construed the 'in custody' requirement for purposes of federal habeas, we have never extended it to the situation in which a habeas petitioner suffers *no* present restraint from a conviction." *Id.* (emphasis added); *see also Garlotte v. Fordice*, 515 U.S. 39, 45 (1995) (citing the quoted passage approvingly); *cf. Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) ("[T]he writ [of habeas corpus] has evolved into an instrument that now demands not only *conviction* by a court of competent jurisdiction but also application of basic constitutional doctrines of fairness." (emphasis added) (citation omitted)).

In their present posture, Respondents (being untried) not only "suffer no present restraint from a conviction," but (because Petitioners' earlier representation that Respondents stand unconditionally released on their own recognizance may be taken literally[19]) suffer no present

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[19] Appendices D, E, and F to this Petition, which reproduce the minute orders releasing Respondents Dry, McConnell, and Burlison (respectively) on their own recognizance, reflect no conditions on their release whatsoever (assuming that a request to inform the Court of the identity of their counsel if they retain one is not a restriction on their liberty), and diligent research by Petitioners' counsel reveals that there are none hidden anywhere else in the record. None of the Respondents was required to sign (or in fact signed) a promise to appear for trial, and if they wish to either default or retain counsel to defend them, Choctaw law does not require them to be present at their trials. (If convicted, of course, they will be required to appear for sentencing, but in that eventuality they may well qualify for habeas relief at *that* time under the authority of *Hensley*.) Unlike Michael Lydon (who would be obligated to serve his two-year sentence if he failed to appear at his trial de novo, *supra* at 22 n.18), no incarceration can automatically result from Respondents' mere failure to appear for trial. And no restrictions have been imposed on their movements whatsoever.

restraint at all. Not one of the "severe restraint" factors that this Court so carefully enumerated in *Boston Municipal Court*, see *supra* at 22 n.18; *see also Hensley*, 411 U.S. at 348 (similar), is in fact present in the instant case.

But in the Tenth Circuit decision below, ignoring both this Court's admonitions that habeas corpus is a remedy limited to situations of "special urgency," *e.g.*, *Hensley*, 411 U.S. at 351, and its equally-express observation that *Jones v. Cunningham's* "restraint not shared by the public generally" criterion *is not individually sufficient to find "custody;" see Hensley*, 411 U.S. at 351 ("*First*, he is subject to restraints 'not shared by the public generally'. . . . *Second*, . . . [h]is incarceration is not. . . . a speculative possibility. . . . " (emphasis added)), that Court found "custody" based on that criterion alone. *See Dry*, 168 F.3d at 1208, *infra* Appendix A, at A-2 – A-3 ("A petitioner is in custody for purposes of the statute if he or she is subject to 'severe restraints on [his or her] individual liberty.' A restraint is severe when it 'is not shared by the public generally.' " (citations omitted) (bracketed material in original)). Petitioners respectfully submit that the quoted language – being conceptually incomplete – is a

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With "restraints" on their liberty virtually if not entirely nonexistent, Petitioners respectfully submit that not only are the restraints not "severe," see *Hensley*, 411 U.S. at 351, but may be so aetherial as to fail to generate an Article III-cognizable injury-in-fact, *compare supra with Spencer v. Kenma*, 118 S.Ct. 978, 983-88 (1998) (applying the injury-in-fact requirement to parole revocations). The fact that it is possible even to conceive of a situation in which a Court of Appeals has held habeas petitioners "in custody" where they may not even be constitutionally injured-in-fact provides but another startling illustration of how far down the "in custody" slope lower federal courts have now come.

non sequitur, and that the Tenth Circuit's interpretation of *Boston Municipal Court*, which follows the language quoted above, is (apart from being based on a false premise[20]) unsustainable based on this Court's caselaw. Phrased another way, the Tenth Circuit's decision below "decided a federal question in a way that conflicts with applicable decisions of this Court." See SUP. CT. R. 10(1)(c).

Nor is that deviation an insignificant one. Assuming for purposes of this Proposition that the 25 U.S.C. § 1303 "detention" precondition is identical to the 28 U.S.C. § 2241 "custody" one, then (given the illusory nature of the "restraints" on Respondents' liberty, *supra* at 24-25 n.19) millions of citizens (from the recipients of parking tickets to jurors) are "in custody" for Section 2241 purposes.[21] The instant case squarely presents this Court with the opportunity to correct that misapprehension[22] – and to arrest any further trivialization of the Great Writ.

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[20] *See supra* at 24-25 n.19.

[21] As this Court will already be aware, that approach to "custody" (and/or "detention") is a far cry from the meaning that it has attributed to those words in numerous other federal-question contexts. *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (defining "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Reno v. Koray*, 515 U.S. 50, 65 (1995) (defining "official detention" for purposes of 18 U.S.C. § 3585(b) (1994)).

[22] Indeed, absent any special circumstances, *see, e.g., Winston v. Lee*, 470 U.S. 753 (1985) (impliedly finding uncharged, and therefore unincarcerated criminal suspect to be "in custody" where state sought to compel unconsented surgery on suspect to remove bullet allegedly fired at perpetrator by victim); *Strait v. Laird*, 406 U.S. 341 (1972) (discussed *supra* at 8); *cf. Cunningham v. Neagle*, 135 U.S. 1 (1890) (finding an *incarcerated* United States Marshal to be "in custody" prior to

IV. SHOULD PETITIONERS' INTERPRETATION OF THIS COURT'S SECTION 2241 CASELAW BE INCORRECT, THEN, AS THE INSTANT PETITION ILLUSTRATES, THAT CASELAW IS BOTH UNWORKABLE AND BADLY REASONED, AND SHOULD BE OVERRULED TO THE EXTENT THAT IT SUPPORTS THE CONCLUSION OF THE COURT OF APPEALS BELOW.

Petitioners are confident that this Court will conclude that the Court of Appeals' decision below can find no support in this Court's caselaw. Should Petitioners' interpretation of that caselaw be erroneous, however (and assuming again for purposes of this Proposition that "detention" and "custody" are synonymous), then Petitioners will demonstrate that as the instant facts clearly illustrate, that caselaw is both unworkable and badly reasoned, *cf., e.g., Payne v. Tennessee,* 501 U.S. 808, 827 (1991) (articulating that standard), and should be overruled to the extent that its supports the Court of Appeals' conclusion below.

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trial, where the Marshal stood criminally accused in state court for killing a man who had attempted to murder Justice Stephen Field); *Thomas v. Loney,* 134 U.S. 372 (1890) (finding an *incarcerated* person criminally charged with perjury in state court for events surrounding certification of a congressional election to be "in custody" prior to trial, and relying on U.S. CONST. art. I, § 5); *Mali v. Keeper of the Common Jail [Wildenhuss's Case],* 120 U.S. 1 (1887) (finding an *incarcerated* foreign citizen charged with murder on a Belgian ship in the port of Jersey City to be "in custody" prior to trial), no decision of this Court has ever found persons who were both unincarcerated and unconvicted to be "in custody" for purposes of 28 U.S.C. § 2241.

V. THE INSTANT CASE PRESENTS THIS COURT WITH AN OPPORTUNITY TO CLARIFY WHEN (IF EVER) A *FIRST* HABEAS PETITION SHOULD BE CHARACTERIZED AS ABUSIVE, AND IN SO DOING TO PROVIDE LOWER FEDERAL COURTS WITH GUIDANCE REGARDING THE APPROPRIATENESS OF DISCRETIONARY WITHHOLDING OF HABEAS RELIEF EVEN WHERE THOSE COURTS HAVE THE POWER TO GRANT IT.

"[D]irect appeal is the primary avenue for review of a conviction or sentence. . . . The role of federal habeas proceedings, while important . . . , is secondary and limited. . . . Even less is federal habeas a means by which a defendant is entitled to delay . . . indefinitely." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Even more specifically, this Court has taken cognizance of delay considerations in applying the "in custody" requirement of 28 U.S.C. § 2241. *See, e.g., Garlotte v. Fordice*, 515 U.S. 39, 46 (1995); *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992). Moreover, considerations of comity and the orderly administration of criminal justice may counsel in favor of refraining from granting the writ of habeas corpus even where a federal court enjoys the power to grant it, *Francis v. Henderson*, 425 U.S. 536, 538-42 (1976), and because habeas corpus is an equitable remedy, courts must be cognizant of and resistant to obvious attempts at manipulation of the system by habeas corpus petitioners, *see, e.g., Lonchar v. Thomas*, 517 U.S. 314, 337-39 (1996) (Rehnquist, C.J., concurring in the judgment); *Gomez*, 503 U.S. at 653-54.

In the instant case (and including one related lawsuit advancing the same theory brought by Respondent Burlison's husband, represented by Respondent Dry as counsel), Respondents brought multiple unsuccessful

lawsuits in the courts of the *Chickasaw* Nation, the State of Oklahoma, and the United States of America, against forty-two individual and governmental defendants before petitioning the United States District Court for the Eastern District of Oklahoma for a pretrial writ of habeas corpus – on precisely the same theory that the other cases had rejected. *Supra* at 5-6. In so doing, they have now forestalled trial on the pending tribal-court misdemeanor charges for almost four years.[23]

Petitioners are well aware of this Court's long line of caselaw holding that the "ends of justice" must be considered by federal courts in determining when to exercise jurisdiction over *successive* habeas petitions, *see, e.g., Kuhlman v. Wilson*, 477 U.S. 436, 451-52 (1986). In light, inter alia, of the authority presented in the first section of this Proposition, however, Petitioners respectfully submit that the instant facts present this Court with the opportunity to clarify whether and when the considerations reflected by those cases should be dispositive even with respect to a first habeas petition. *Cf. Lonchar*, 517 U.S. at 324 ("[E]quitable rules that guide lower federal courts reduce

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[23] In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court quoted the testimony of the Mescalero Apache Tribal Council on a proposed (but unenacted) federal ICRA *civil* claim as follows: "[I]f the perpetually dissatisfied individual Indian were to be armed with legislation such as proposed in [this bill] he could disrupt the whole of a tribal government." *Id.* at 68 (bracketed material in original). As the instant facts indicate, that observation applies with almost equal force when an Indian tribe is confronted with persistent and aggressive tribal-member litigants armed with arguable (if unavailing) weapons extrinsic to the ICRA – and buttressed by the possibility of a pretrial habeas corpus petition based on precisely the same grounds.

uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants, including the State, whose interests in 'finality' such rules often further."). Petitioners also submit that were there ever a case calling for the application of those factors at the first-petition stage, *cf. id.* at 325 (noting that even at that stage, habeas corpus Rule 4 authorizes the petitioned court to "take such other action as the judge deems appropriate"),[24] that case is the one Petitioners present today to this Court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to grant a writ of certiorari in the instant case.

Respectfully submitted,

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[24] In suggesting that this Court provide specific guidance to lower federal courts with respect to first-petition dismissals, Petitioners in no way invite this Court to issue a blank check authorizing such dismissals based on amorphous, generalized, undifferentiated grounds, whether or not such reasons may be characterized as "equitable." *Cf. Lonchar*, 517 U.S. at 329 (rejecting such an approach).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Douglas DRY; Rosie Burlison; Juanita McConnell, Petitioners-Appellants,

v.

CFR COURT OF INDIAN OFFENSES FOR THE CHOCTAW NATION; James Wolfe, Magistrate, Respondents-Appellees.

No. 98-7027
United States Court of Appeals,
Tenth Circuit
Feb. 22, 1999

Before BRORBY, McWILLIAMS and KELLY, Circuit Judges.

BRORBY, Circuit Judge.

Appellants, Douglas Dry, Rosie Burlison and Juanita McConnell, are Choctaw Indians charged with various violations of the Choctaw Criminal Code. After arraignment, the Court of Indian Offenses for the Choctaw Nation released Appellants on their own recognizance pending trial. Appellants then filed a petition for writ of habeas corpus in federal court, challenging the jurisdiction of the Court of Indian Offenses. The district court dismissed the petition, concluding Appellants were not

"in custody" for purposes of 28 U.S.C. § 2241, and Appellants appealed. We exercise jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253 and reverse. We review the district court's dismissal of Appellants' habeas petition *de novo*. *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996).

Federal courts have jurisdiction to grant writs of habeas corpus to persons "*in custody* in violation of the Constitution or laws or treaties of the United States."[1] 28 U.S.C. § 2241(c)(3) (emphasis added). A petitioner must satisfy the "in custody" requirement as a prerequisite to habeas corpus jurisdiction. *Carter v. United States*, 733 F.2d 735, 736 (10th Cir. 1984), *cert. denied*, 469 U.S. 1161, 105 S.Ct. 915, 83 L.Ed.2d 928 (1985). A petitioner need not show actual, physical custody to obtain relief. *Maleng v. Cook*, 490 U.S. 488, 491, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). A petitioner is in custody for purposes of the statute if he or she is subject to "severe restraints on [his or her] individual liberty." *Hensley v. Municipal Court*, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973). A restraint is severe when it is "not shared by the public

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[1] Petitioners also rely on the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, as a basis for habeas corpus jurisdiction. The Indian Civil Rights Act makes habeas corpus "available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303 (emphasis added). We read the "detention" language as being analogous to the "in custody" requirement contained in 28 U.S.C. § 2241. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 890-93 (2d Cir.), *cert. denied*, ___U.S.___, 117 S.Ct. 610, 136 L.Ed.2d 535 (1996). As such, Appellants must meet the custody requirement discussed above whether the district court bases its jurisdiction on 25 U.S.C. § 1303 or 28 U.S.C. § 2241.

generally." *Jones v. Cunningham*, 371 U.S. 236, 240, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

In this case, tribal authorities charged, arraigned, and released Appellants on their own recognizance pending trial.[2] Although Appellants are ostensibly free to come and go as they please, they remain obligated to appear for trial at the court's discretion. This is sufficient to meet the "in custody" requirement of the habeas statute. See *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-01, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984) (concluding petitioner released on his own recognizance, after his conviction was vacated on application for a new trial, was "in custody" for purposes of habeas corpus statute); *Kolski v. Watkins*, 544 F.2d 762, 763-64 and n.2 (5th Cir. 1977) (holding petitioner released on his own recognizance after arrest was "in custody"); *United States ex rel. Scranton v. New York*, 532 F.2d 292, 293-94 (2d Cir. 1976) (concluding petitioner released on her own recognizance after indictment was in custody because she could be ordered to appear before the court at any time); *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (concluding petitioner's release on his own recognizance after being charged by tribal court "did not deprive the district court of jurisdiction" over habeas petition), *rev'd sub nom. on other grounds, Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

Accordingly, we REVERSE the trial court's dismissal and REMAND for further proceedings. On remand, the

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[2] The Court of Indian Offenses stayed the criminal proceedings pending resolution of this petition.

district court should consider, in the first instance, whether Petitioners have sufficiently exhausted their tribal remedies. *See Capps v. Sullivan*, 13 F.3d 350, 353-54 (10th Cir. 1993) (discussing exhaustion requirement for § 2241 petitions); *Wetsit v. Stafne*, 44 F.3d 823, 826 (9th Cir. 1995) (concluding petitioners must exhaust tribal remedies before filing petition for writ of habeas corpus).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

Douglas G. DRY, Juanita McConnell, and Rosie Burlison, Petitioners,

v.

CFR Court of Indian Offenses of the Choctaw Nation and James Wolfe, Magistrate, Respondents.

No. CIV-98-11-S
United States District Court for the
Eastern District of Oklahoma
Feb. 2, 1998

SEAY, District Judge.

MINUTE ORDER

Dismissing case pursuant to 28 U.S.C. Section 2241(c) as petitions have not satisfied the "in custody" requirement. (FHS) closing case. (cc: all counsel).

APPENDIX C

COURT OF INDIAN OFFENSES
OF THE CHOCTAW NATION

CHOCTAW NATION of Oklahoma, Plaintiff,

v.

Douglas DRY; Juanita McConnell, and Rosie Lee Burlison, Defendants.

Nos. CRM-95-01
CRM-95-02
CRM-95-04
CRM-95-05
Court of Indian Offenses of the Choctaw Nation
Jan. 24, 1997

WOLFE, Associate Magistrate.

MINUTE ORDER

Now on this 24th day of January, 1997, the court does hereby overrule Defendants' Motion to Dismiss. Exceptions allowed.

APPENDIX D

COURT OF INDIAN OFFENSES
OF THE CHOCTAW NATION

Choctaw Nation of Oklahoma, Plaintiff,

v.

Douglas G. Dry, Defendant.

No. CRM-95-01
Court of Indian Offenses of the Choctaw Nation
Sept. 4, 1995

WOLFE, Associate Magistrate.

MINUTE ORDER

Defendant appears in person. Charges explained. Rights explained. Enters plea of not guilty to disturbing the peace and resisting arrest. Defendant released on own recognizance. Defendant to report to court within 15 days as to attorney.

APPENDIX E

COURT OF INDIAN OFFENSES
OF THE CHOCTAW NATION

Choctaw Nation of Oklahoma, Plaintiff,

v.

Juanita McConnell, Defendant.

No. CRM-95-03
Court of Indian Offenses of the Choctaw Nation
Sept. 4, 1995

WOLFE, Associate Magistrate.

MINUTE ORDER

Defendant appeared in person. Advised of charges. Advised of rights. Pleaded not guilty. Released on O.R.

APPENDIX F

COURT OF INDIAN OFFENSES
OF THE CHOCTAW NATION

Choctaw Nation of Oklahoma, Plaintiff,

v.

Rosie Burlison, Defendant.

No. CRM-95-04
Court of Indian Offenses of the Choctaw Nation
Sept. 4, 1995

WOLFE, Associate Magistrate.

MINUTE ORDER

Defendant appeared in person. Advised of charge. Advised of rights. Pleads not guilty. Released O.R.

Defendant enters plea of guilty[1] to resisting arrest and disturbing the peace. Defendant ordered to report as to attorney within 15 days from this date.

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[1] NOTE TO THE UNITED STATES SUPREME COURT FROM COUNSEL FOR PETITIONERS: Probably should read "not guilty." Counsel for Petitioners do not dispute that Respondent Burlison so pled before the Court of Indian Offenses, as the first paragraph of the minute order indicates.

APPENDIX G

TRIBAL COURT OF THE CHOCTAW NATION

Randle DURANT, Bob Pate, Leslie James, Bertram Bobb, Charley Jones, Lois Burton, E.J. Johnson, Ted Dosh, James Frazier, Charlotte Jackson, and Perry Thompson, Petitioners,

v.

Douglas G. DRY, Bob Burlison, Juanita McConnell, and Rosie Burlison, Respondents.

No. C-96-02
Tribal Court of the Choctaw Nation
Dec. 3, 1996

Before PRESIDING JUDGE WOLFE, and JUDGES JEFFERSON and MULLIN.

WOLFE, Presiding Judge.

This matter comes on for hearing on October 12, 1996, on Petitioners' Petition for Declaratory and Injunctive Relief. Petitioners appear by Bob Rabon; Respondents appear by Scott Kayla Morrison. Arguments have been presented and briefs filed, and based thereon the Court FINDS:

(1) That Council Bills 138-91 and 111-92 are constitutional, and that the Choctaw Nation Constitution does not prohibit the tribal government from contracting with the Secretary of the Interior, *etc.*;

(2) That the Choctaw Nation has the constitutional authority to enter into cross-deputization agreements with the Bureau of Indian Affairs and any state, county, city or any other local government law enforcement agency; and

(3) That Bob Burlison and Douglas G. Dry are without authority to seek decisions in the state district courts concerning the internal affairs of the Choctaw Nation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

(1) That Council Bills 138-91 and 111-92 are constitutional, and that the Choctaw Nation Constitution does not prohibit the tribal government from contracting with the Secretary of the Interior, *etc.*

(2) That the Choctaw Nation has the constitutional authority to enter into cross-deputization agreements with the Bureau of Indian Affairs and any state, county, city or any other local government law enforcement agency.

(3) That Bob Burlison and Douglas G. Dry are without authority to seek decisions in the state district courts concerning the internal affairs of the Choctaw Nation.

APPENDIX H

COURT OF INDIAN OFFENSES
(APPELLATE DIVISION)
FOR THE CHICKASAW NATION

Douglas G. DRY; Rosie Lee Burlison, and Juanita McConnell, Petitioners,

v.

COURT OF INDIAN OFFENSES of the Choctaw Nation, Respondent,

– and –

Choctaw Nation of Oklahoma, Real Party in Interest.

No. CIV-96-C27
Court of Indian Offenses (Appellate Division)
for the Chickasaw Nation
June 12, 1997

Before CHIEF MAGISTRATE TAH-BONE, and ASSOCIATE MAGISTRATES CRYER and LUJAN.

LUJAN, Associate Magistrate.

On this date, April 16, 1997, the Court of Indian Appeals for the Muskogee Area Tribes considered the above-styled and numbered cause. This action was begun by a Petition for Writ of Prohibition filed by Petitioners Douglas Dry, Rosie Lee Burlison, and Juanita McConnell

against the Respondent Court of Indian Offenses of the Choctaw Nation.

The record reflects that criminal charges were filed against the Petitioners individually in the Court of Indian Offenses of the Choctaw Nation. On September 29, 1995, the Defendants/Petitioners were formally arraigned.

On September 28, 1995, Defendants/Petitioners filed a Motion to Dismiss for lack of subject-matter jurisdiction in the Choctaw Nation trial court. A hearing was held on the Motion on March 5, 1996. According to the record, no decision concerning this motion has been made by the trial court to date.

On July 24, 1996, Petitioners/Defendants filed a Petition for a Writ of Prohibition seeking to involve the extraordinary writ powers of this Court.

After reviewing the pleadings, the exhibits and the briefs, this Court finds that the threshold issue of whether this Court has jurisdiction to issue a writ of prohibition is dispositive of this case.

The Court of Indian Offenses is a court of limited jurisdiction. It may only exercise authority where and when it is properly established as a tribal court. There has been much discussion concerning the nuances of the CFR courts' dual character. One is its congressional federal grant of authority, and the other the inherent sovereignty of Indian nations for whom the CFR courts operate. However, one thing is clear. The CFR courts depend fundamentally upon inherent tribal sovereignty. Therefore, the analysis of each tribe's specific circumstances must be done on an individualistic basis.

The Choctaws are a unique situation. The Choctaw Constitution specifically created a Tribal Court and limited its jurisdiction to disputes "arising under any provisions of this Constitution or any rule or regulation enacted by the Tribal Council." The Choctaw Nation's citizenry expressly rejected an amendment provision to expand the Tribal Court's jurisdiction to civil, criminal and probate matters in 1983. The Constitution has never been amended concerning the Tribal Court's jurisdiction.

This case contains no evidence that the Court of Indian Appeals for the Muskogee Area Tribes has ever been properly established or designated as the Appellate Court of the Choctaw Nation. The Court notes that this analysis and conclusion does not in any way depend upon the validity or proper establishment of the Court of Indian Offenses of the Choctaw Nation. It would be improper for this Court to make such findings because it is outside of our jurisdictional scope. This Appellate Court states simply that it is not the proper forum to make such a determination.

Accordingly, for the reasons states above, the Respondent's Motion to Dismiss is granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Respondent's Motion to Dismiss is granted, and this matter is dismissed for lack of jurisdiction.

APPENDIX I

DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

Bob BURLISON, Plaintiff,

v.

Frank KEATING, Governor of the State of Oklahoma, City of Atoka, Atoka Police Department, Atoka County Sheriff's Office, City of Antlers, Antlers Police Department, Pushmataha County Sheriff's Office, City of Caddo, Caddo Police Department, City of Durant, Durant Police Department, Bryan County Sheriff's Office, Choctaw Nation of Oklahoma, and Bureau of Indian Affairs, Defendants.

No. CJ-96-6410
District of Court of Oklahoma County
State of Oklahoma
Oct. 18, 1996

AMICK, District Judge.

ORDER

Now on this 30th day of September, 1996, the above matter comes on before the undersigned Judge of this Court and the Court having first considered the Motion to Dismiss for Improper Venue filed by the defendants, City of Antlers, Antlers Police Department; City of Caddo, Caddo Police Department; City of Durant, Durant Police Department; Bryan County Sheriff's Department; Atoka County Sheriff's Department; City of Atoka, Atoka

Police Department; and Choctaw Nation of Oklahoma, and the Court having heard argument of counsel finds that venue does not properly lie in this Court because the only resident defendant, Frank Keating, Governor of the State of Oklahoma, is not a proper party to this action. Accordingly, this action is dismissed as to the defendant, Frank Keating, and this cause is ordered transferred to the District Court of Atoka County, Oklahoma.

(s)
District Judge

APPROVED AS TO FORM:

(s)
Douglas G. Dry, Attorney for Plaintiff

(s)
Bob Rabon for all local government defendants, except City of Antlers and Pushmataha County

APPENDIX J

DISTRICT COURT OF ATOKA COUNTY, OKLAHOMA

Bob BURLISON, Plaintiff,

v.

CHOCTAW NATION *et al.*, Defendants.

No. C-96-198
District Court of Atoka County
State of Oklahoma
Aug. 8, 1997

GABBARD, District Judge.

ORDER

On April 29, 1997, this matter came on for hearing. The parties appeared with their attorneys. Testimony was taken, evidence received and arguments heard. Now, after fully considering the matter, the Court makes the following findings and orders:

Plaintiff seeks a declaratory judgment that the cross-deputization contracts signed by the Defendants are violative of his State and Federal due process and equal protection rights. He also seeks injunctive relief. The Defendants move to dismiss.

Because Plaintiff has failed to properly serve the Defendant B.I.A. pursuant to 12 O.S. 2004(C)(1)(c4), its Motion to Dismiss is hereby granted. However, the remaining issues merit more discussion.

The Choctaws are one of the Five Civilized Tribes of Indians. Their 1860 Constitution was the culmination of at least four previous efforts. They had an elected Chief, an organized system of government and a code of laws. Nevertheless, after 1860, the U.S. Government began a systematic policy of termination and assimilation of the Choctaw and other Tribes. In 1898, Congress passed the Curtis Act, 30 Stat. 495, which forced allotment of Tribal lands, made all tribal laws unenforceable, and abolished all tribal courts. Tribal self-government became almost non-existent.

Eventually, the mood of Congress and the public changed. In 1936, Congress passed the Oklahoma Indian Welfare Act, 49 Stat. 1967, 25 U.S.C. 501 et seq., reorganizing the Choctaw Tribe, and authorizing its adoption of a new constitution by popular tribal election. In 1967, Choctaws were again allowed to popularly elect their Chief. 84 Stat. 1091.

In 1980, several Choctaw citizens challenged the 1977 Choctaw Constitution in federal district court, alleging that the 1860 constitution was still intact. The federal court ordered the Choctaws to conduct an election to determine the content of a new constitution. *Morris v. Watt,* 640 F.2d 404 (D.C. Cir. 1981). One of the questions submitted was whether "the tribal court's jurisdiction would include general civil, criminal and probate matters" and the majority of electors said "no." A new Constitution was drafted in accordance with the election results, and was approved in 1983. Art. XIII, Sec. 1 of that adopted Constitution provides:

> The Tribal Court shall have exclusive jurisdiction to decide disputes, by vote of two (2) members, arising under any provision of this Constitution or any rule or regulation enacted by the Tribal Council.

Generally, criminal prosecution in Indian Country has a checkered history. Before Europeans came, Indians made their own laws and were ruled by them. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). However, federal incorporation, treaties, and Congressional action gradually limited this inherent power. After the Curtis Act abolished tribal law enforcement and courts, only federal courts could enforce criminal laws on Indian land, and that enforcement was limited to a dozen major crimes. 18 U.S.C. 1151 et seq. Most criminal activity in Indian Country went unpunished. In 1953, Congress attempted to fill this gap by Public Law 280, which gave States the authority to assume jurisdiction over all crimes on Indian Land by legislative act. Oklahoma failed to do so. In 1968, Congress amended the Act to require tribal permission. Oklahoma failed to request same.

However, the 1968 Indian Civil Rights Act, 25 U.S.C. 2801 et seq., did provide a mechanism for tribal law enforcement. The Act began by recognizing that the Tribes' "powers of self-government" included "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including . . . the inherent power of Indian tribes . . . to exercise criminal jurisdiction." That Act provided for the establishment of Courts of Indian Offenses, a model code

to govern the administration of those courts, and a list of civil rights which mirrored many of those rights guaranteed by the U.S. Constitution. It also provided that the model code contain provisions which would "assure that any individual being tried for an offense by a Court of Indian Offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to such individual." Thus, C.F.R. courts were clearly tribal courts regulated by federal law. In 1991, the Choctaws approved a contract with the B.I.A. for a law enforcement program pursuant to this Act, passed a code of offenses, and established a C.F.R. court.

However, C.F.R. courts were not a complete answer to crimes on tribal land. The Federal government, State, and Tribes all had a portion of criminal jurisdiction, often depending on whether the land was "Indian Country" – a somewhat ambiguous term. Oklahoma had few reservations. Eastern Oklahoma, in particular, was a patchwork of checkerboard tracts and allotments scattered over large areas. Federal officers were few in number, tribal law officers were almost non-existent, and State and local officers could never be sure of their jurisdictional authority. While State officers could arrest persons for federal offenses, they had no authority to arrest or prosecute crimes within Indian jurisdiction. *Langley v. Ryder,* 778 F.2d 1092 (5th Cir. 1985). State and local law officers often acted at their own peril of being sued for exercising excessive jurisdiction. *Ross v. Neff,* 905 F.2d 1349 (10th Cir. 1990). Consequently, many Indian citizens had little protection from lawless acts.

To solve this problem, Congress passed the Indian Law Enforcement Reform Act, 25 U.S.C. 2801 et seq. That Act authorized Tribes to enter into agreements with Federal, tribal, State or other government agencies for:

> the use of the personnel or facilities of federal, tribal, state or other government agencies to aid in the enforcement or carrying out in Indian Tribe that has authorized the Secretary to enforce tribal laws.

To facilitate such agreements, the Oklahoma Legislature passed the State Tribal-Relations Act, 74 O.S. 1221 et seq., which authorized the State to enter into cooperative agreements with the Tribes, and the Interlocal Cooperation Act, 74 O.S. 1001 et seq., which authorized it to enter into cooperative agreements with federal, state, county and city agencies.

In 1994, the Defendants in this case approved a cross-deputization agreement to improve law enforcement in the State and in Indian Country. That Agreement states in part:

> All the parties to this Agreement recognize that when law enforcement officers arrest a criminal suspect, the officers may not know whether the suspect or the victim is an Indian or whether the arrest or the suspected crime has occurred in Indian Country. The parties further expressly recognize the manifest intent of the Indian Law Enforcement Act to eliminate the uncertainties which previously resulted in the reluctance of various law enforcement agencies to provide services in Indian Country for fear of being subjected to tort and civil rights suits . . .

In 1996, plaintiff was arrested by Choctaw Nation tribal officers for violating Choctaw Council Bill 113-96. He was jailed and charged in C.F.R. court. That Court ultimately ordered the charges dismissed. Plaintiff then participated in a suit (Case No. C-96-2) in the Constitutional Tribal Court requesting a declaratory judgment regarding the constitutional-authority of the Nation to establish C.F.R. courts and to enter into cross-deputization agreements. On December 3, 1996, after extensive briefs and arguments, that Court found that the Choctaw Nation had constitutional authority for both. Plaintiff now requests this Court to make the opposite finding. However, he stated here and in the federal removal proceeding that he raises no federal question.

Indians are, of course, U.S. citizens. 8 U.S.C. 1401(a2). As such, they may claim protection under the federal and State constitutions. Although States, with Congressional approval, may generally enter into compacts and agreements as they see fit, these agreements may not diminish or enlarge constitutional rights. 72 Am. Jur. 2d, "States," Sec. 5; *Pollard v. Hagan*, 3 How. 212, 11 L.Ed. 565. If State legislation or agreements have legitimate goals and their classifications are reasonably related to the achievement of those goals, they are usually not held to be so arbitrary as to violate due process. *State v. Fed. Energy Reg. Comm'n*, 494 F.Supp. 636, *cert. den.*, 102 S.Ct. 2902 (D.C. Okl. 1980). When criminal procedure is considered, Due Process basically contemplates an orderly proceeding adapted to the nature of the case, before a tribunal having jurisdiction, which proceeds upon notice, with opportunity to be heard, and full power to grant relief. *Dodds v. Ward*, 418 P.2d 629 (Okl. 1966).

The cross-deputization agreements at issue in this case are clearly designed to protect the public by more efficient enforcement of state, federal, and tribal laws. The Court finds nothing repulsive in this goal, nor in the scheme used to achieve it. Moreover, each of the forums involved (state, federal and tribal) provide orderly tribunals for the processing of criminal cases. The fact that the Plaintiff is not satisfied with the outcome of his Constitutional Tribal Court case is not dispositive. 16 C.J.S., "Constitutional Law," Sec. 964 notes:

> (Due Process) is not a guarantee that every court ruling shall be correct, or that every decision reached will be factual or just, but it is a guaranty that the fundamental principles of justice shall not be violated and that a decision will be reached by processes which are fair. So the constitutional question of due process of law is not involved where the question is the validity of the judgment . . .

For these reasons, the Court finds that these agreements do not violate Due Process.

Plaintiff claims that cross-deputization agreements single tribal members out as a suspect racial class in violation of Equal Protection. However, the unique status of Indian Tribes under federal law permits the federal government to enact legislation singling out tribal Indians, even though the legislation might otherwise be constitutionally offensive. *Morton v. Mancari*, 411 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290. States do not enjoy this same unique status. However, the laws enabling cross-deputization agreements are not simply additional State

laws. They were enacted in response to a federal measure designed to protect state and tribal citizens.

Historically, the U.S. Supreme Court has used classifications based on tribal status in many of its decisions involving the jurisdiction of Indians. *U.S. v. McBratney,* 104 U.S. 621, 26 L.Ed. 869. Such classifications are not "suspect" so as to require justification of a compelling state interest for Equal Protection analysis. *Morton v. Mancari, supra; U.S. v. Antelope,* 430 U.S. 641, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977); *Washington v. Yakima Indian Nation,* 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

Under conventional Equal Protection analysis, legislative enactments are valid unless they bear no rational relationship to the State's objectives. *Mass. Board of Retirement v. Murgia,* 96 S.Ct. 2562, 49 L.Ed.2d 520. State law "does not violate the Equal Protection clause merely because the classifications (it makes) are imperfect." *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491.

The cross-deputization agreements in this case are clearly designed to promote the State's police power, "eliminate a serious hiatus in law enforcement authority," and ensure the protection of state and tribal citizens. They do so in a far more rational manner than the checkerboard jurisdictional scheme approved by the U.S. Supreme Court in *Washington v. Yakima Nation, supra.* Thus, Plaintiff's equal protection argument must also fail.

Plaintiff indirectly seeks this Court to review an issue already fully litigated and decided in Tribal Court.

Historically, the courts have divided on how Tribal judgments should be treated for recognition purposes. Some courts have treated these decrees like sister-state judgments (U.S. CONST. art. IV, sec. 1), some like judgments of federal "territories" (28 U.S.C. 1738), and some like judgments of foreign countries. The Oklahoma Legislature attempted to resolve this problem in 1992 by the passage of 12 O.S. 728. That statute authorizes the Oklahoma Supreme Court to issue a court rule regarding the matter. In 1994, our Court did that by adopting District Court Rule 30, Title 12, Ch. 2 App., which provides that state District Courts shall give full faith and credit to tribal courts who agree to grant state decrees the same reciprocity. Unfortunately, the Choctaw Nation has not elected to do that. *See* Supreme Court Adm. Dir. No. 94-15. Therefore, the question of comity must be decided by general principles of law regarding the recognition of foreign judgments.

As a sovereign nation, the Choctaw tribe is not a federal entity, nor does it hold the status of a sister state. For that reason, it is not entitled to the same full faith and credit accorded decrees of those entities. *See U.S. ex rel Jackson v. Meyerling*, 54 F.2d 621, *cert. den.*, 52 S.Ct. 498; *Denton v. Cronin*, 529 P.2d 644. However, it is entitled to the same deference shown decisions of foreign nations as a matter of comity. U.S. CONST. art. 4, sec. 1. Generally, foreign nation judgments are entitled to recognition to the same extent and scope as in the courts of the jurisdiction where rendered, if: (1) the foreign court actually had jurisdiction over both the subject matter and the parties; (2) the decree was not obtained fraudulently; (3) the decree was rendered under a system of law reasonably

assuring the requisites of an impartial administration of justice – due notice and a hearing; and (4) the judgment did not contravene the public policy of the jurisdiction in which it is relied upon. *Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895). This is essentially the rule adopted by the Oklahoma Court in *Barrett v. Barrett,* 878 P.2d 1051 (Okl. 1994), when it cited with approval the Court's pronouncement in *Britton v. Gannon,* 285 P.2d 407 (Okl. 1955), that state courts are:

> not required to recognize the judgment of a court of another state, territory, or country subject to the jurisdiction of the United States, where the court rendering the judgment was without jurisdiction or the judgment was obtained by extrinsic fraud.

Procedural differences between state courts and the other court system are not sufficient reasons to refuse recognition. *Panama Processes v. Cities Service Inc.,* 796 P.2d 276 (Okl. 1990).

In this case, although Plaintiff claims no fraud or contravention of public policy, he does claim that tribal courts lacked criminal jurisdiction. However, in deciding whether to grant comity, the question is whether the Constitutional Tribal Court had jurisdiction to hear the matter, not whether the tribal courts had jurisdiction to enforce criminal laws. The answer to this question is clear. The Choctaw Constitution provides:

> The Tribal Court shall have exclusive jurisdiction to decide disputes, by vote of two (2) members, arising under any provision of this Constitution or any rule or regulation enacted by the Tribal Council.

Because the Tribal Court had subject matter jurisdiction, Plaintiff has failed to make a showing sufficient to defeat comity. The Court finds that the Tribal Court decree should be recognized. Just as this State's highest court is best able to decide constitutional issues (subject to federal review), so too is the Choctaw Constitutional Tribal Court best able to decide its constitutional questions.

In *Citizen State Bank v. Hall*, 413 P.2d 513 (Okl. 1966), the Oklahoma Supreme Court stated:

> A final judgment of a court of competent jurisdiction is conclusive between the parties and their privies in a subsequent action involving the same subject matter, not only as to all matters litigated and determined in the former action, but also as to all matters germane to issues which could or might have been litigated therein.

The Court finds that Plaintiff's state and federal due process and equal protection rights have not been violated by the cross-deputization agreements, and, although the matter may be subject to federal review, this court is bound by comity from reconsidering the constitutionality of the C.F.R. courts or the Choctaw criminal code. For these reasons, the Petition for Declaratory and Injunctive Relief is hereby DENIED, and Defendants' Motions to Dismiss are GRANTED.

APPENDIX K

COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

Bob BURLISON, Appellant,

v.

CITY OF ATOKA, Atoka Police Department, County of Atoka, Atoka County Sheriff's Office, County of Pushmataha, Pushmataha County Sheriff's Office, City of Caddo, Caddo Police Department, City of Durant, Durant Police Department, County of Bryan, Bryan County Sheriff's Office, Choctaw Nation of Oklahoma, and Bureau of Indian Affairs, Appellees.

No. 90,028
Oklahoma Court of Civil Appeals
(Division 4)
Dec. 29, 1998

Before PRESIDING JUDGE RAPP, and
JUDGES REIF and STUBBLEFIELD.

REIF, Judge.

MEMORANDUM OPINION

This appeal concerns an arrangement under federal law for the Choctaw Nation of Oklahoma to provide law enforcement of tribal law through cross-deputization agreements with various city and county law enforcement agencies. The federal law in question also provides for the Choctaw Nation to establish a court to handle violations of tribal law that are referred by Choctaw tribal law enforcement officers or cross-deputized city and county officers. Bob Burlison filed the suit below (1) asking for a declaratory judgment that this arrangement for enforcement of tribal law violated the Choctaw Constitution, and (2) seeking an injunction to prohibit the Choctaw Nation and the cross-deputized officers from the cities and counties from enforcing tribal law under this arrangement. In a six-page order that thoroughly considered the law and issues, the trial court denied Mr. Burlison relief. The trial court dismissed the case under comity on the basis of a Choctaw tribal court judgment that held this arrangement did not violate the Choctaw Constitution. Upon review, this court summarily affirms the trial court under Supreme Court Rule 1.202(d), 12 O.S. Supp. 1997, ch. 15, app. 1, because the opinion of the trial court adequately explains the decision.

AFFIRMED under Rule 1.202(d).

STUBBLEFIELD, P.J., and RAPP, J. concur.

APPENDIX L

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

Douglas G. DRY, Juanita McConnell, and Rosie Burlison, Plaintiffs,

v.

UNITED STATES OF AMERICA, Bruce Babbitt, in his official capacity as Secretary of Interior; Ada E. Deere, in her official capacity as Assistant Secretary of Interior for Indian Affairs; Jim Fields, in his official capacity as the successor Muskogee Area BIA Director; Perry Proctor, in both his official and individual capacities; Dennis Springwater, in both his official and individual capacities; Karen Ketcher, in both her official and individual capacities; Curtis Wilson, in his official capacity as the BIA Contracts Officer; Larry Mings, in both his official and individual capacities; Bob Rabon, in both his official and individual capacities; Robert L. Rabon, in both his official and individual capacities; Kim Reed, in both her official capacities; Hoppy Denison, in both his official and individual capacities; Bill Barrow, in both his official and individual capacities; Mike Russell, in both his official and individual capacities; Steven Flowers, in both his official and individual capacities; Chris Welch, in both his official and individual capacities; Kenneth Johnson, in both his official and individual capacities; Blake Johnico, in both his official and individual capacities; City of Tahlequah; Jack England, in both his official and individual capacities; Malcomb Wade, in both his official and individual capacities; Niky Hibdon, in both her official and individual capacities; Lloyd James,

in both his official and individual capacities; John Wheat, in both his official and individual capacities; Naomi O'Daniels, in both her official and individual capacities; City of Clayton; Terry Bell, in both his official and individual capacities; Rowland Hall, in both his official and individual capacities; Mike Van Horn, in both his official and individual capacities; Darrel Kirkes, in both his official and individual capacities; Rebecca Johnson, in both her official and individual capacities; and Jimmy Long, in both his official and individual capacities, Defendants.

No. CIV-97-113-B
United States District Court
Eastern District of Oklahoma
Sept. 30, 1998

BURRAGE, District Judge.

ORDER

This matter comes before the Court on the Motion to Dismiss filed by Defendant Hoppy Denison on July 11, 1997 (Docket Entry #116). A timely[1] response and a

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[1] In responding to Defendant Denison's Motion, Dry states that "[i]n consideration of judicial economy, court administrative economy, and to honor our Native beliefs of being good stewards of Mother Earth by saving trees, Plaintiffs incorporate all prior briefs filed in the case at bar in response to the above named defendants' motion to dismiss, including all exhibits attached to such responses." While Dry's stated goal in incorporating his other responses to the seven motions to dismiss pending in this case might be laudable, the practice

timely reply were filed to the Motion. Upon review and consideration of these pleadings, this Court renders the ruling reflected herein.

This case arises from events which allegedly occurred on September 4, 1995, when Plaintiffs attended Labor Day festivities at Tuskahoma, Oklahoma. Plaintiffs allege that they were forcibly restrained and arrested for possessing and distributing " 'items of literature which expressed opinions concerning matters of public concern.' "

Plaintiffs' Amended Complaint states the following specific factual allegations against Defendant Hoppy Denison ("Denison"):

Count I

Plaintiff Douglas G. Dry ("Dry") contends that Denison, among others, forcibly restrained Dry, placed him under arrest and seized the literature that he was carrying. Dry states that Denison, who is identified as the Chief of the Tribal Police for the Choctaw Nation, transported him to the Talihina Police Department. Dry contends that as a result of the unlawful arrest, he suffered physical injury. Dry also alleges that he was incarcerated "for over two hours while Denison conspired with tribal attorney Bob Rabon, as to what criminal charges could justify the illegal acts of the Defendant police officers."

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does not assist this Court in determining the precise arguments in opposition to the specific motion under consideration. This Court therefore derives many of Dry's arguments from the response that he and his fellow Plaintiffs filed to the motion to dismiss filed by Defendant Kim Reed.

Dry asserts that, since the Choctaw Nation lacked the requisite jurisdiction and authority to "prescribe" the conduct for which he was arrested, Denison and the other tribal officers acted pursuant to the authority of the Bureau of Indian Affairs ("BIA"). Dry concludes that Denison and others acted "with deliberate indifference and callous disregard of Plaintiff's rights," depriving him of his constitutional rights to freedom of speech, freedom of assembly, due process, equal protection under the law and impeded the due course of justice, all in violation of the First and Fifth Amendments.

Count II

Dry contends that Denison, with others, arrested him without reasonable grounds to believe Dry had committed an offense and without probable cause. Dry alleges that he was incarcerated for over two hours in the Talihina Police Station and was, therefore, deprived by Denison of his liberty without due process of law and equal protection under the law, all in violation of his constitutional rights guaranteed by the Fourth and Fifth Amendments to the United States Constitution.

Count IV

This claim alleges that Denison and others "deliberately, intentionally and maliciously, committed against [Dry], an assault and battery, unlawful detention, false imprisonment, and wrongful arrest." Dry brings this claim under the Federal Tort Claims Act. Through the pending Motion, Denison contends that he acted under color of tribal law and, therefore, no *Bivens* cause of

action is cognizable against him. Further, Denison argues that Congress has created only one type of cause of action against tribal officials, pursuant to the Indian Civil Rights Act of 1968, and no violation of that law has been alleged in this action. Denison urges that Congress and the judiciary have consistently considered such matters as are alleged in this case as intra-tribal disputes, for which federal intervention is discouraged. Denison also contends that Dry can have no constitutional claims against him because the United States Constitution does not apply to the Indian tribes or tribal officials. Finally, Denison contends that under the prevailing authority, Indian tribes possess inherent criminal jurisdiction under which its officials act. The only manner in which this jurisdiction may be revoked is by express congressional mandate. Thus, Denison argues that he acted pursuant to this inherent tribal jurisdiction, thereby warranting dismissal of these federal, constitutional claims.

As an initial matter, Denison recognizes that the United States has been substituted for him on the claim brought pursuant to the Federal Tort Claims Act.[2] As a result, his Motion does not address this claim. A further review of the Motion to Dismiss filed by the United States reveals that, while the United States recognizes its substitution for Denison in its Motion, it does not seek dismissal of the tort claim against him. Consequently, this claim shall remain pending against Denison and will not be addressed further within this Order.

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[2] The claim in reference to which the United States has been substituted for Denison is Count IV.

Denison specifically states that he seeks dismissal under Fed. R. Civ. P. 12(b)(6) Typically, an action should not be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure unless "the plaintiff can prove no set of facts in support of the claims that would entitle him to relief." *Reynolds v. School District No. 1, Denver, Colorado,* 69 F.3d 1523, 1536 (10th Cir. 1995) (citing *Coosewoon v. Megidian Oil Co.,* 25 F. 3d 920, 924 (10th Cir. 1994)). In reviewing the sufficiency of the complaint, a court "presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Riddle v. Mondragon,* 83 F.3d 1197, 1202 (10th Cir. 1996) (citing *Hall v. Bellmon,* 935 F.2d 1106, 1109 (10th Cir. 1991)). The "[g]ranting [of] defendant's motion to dismiss is a harsh remedy which must be cautiously studied . . . to protect the interests of justice." *Bangerter v. Orem City Corp.,* 46 F.3d 1491, 1502 (10th Cir. 1995). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Quality Foods v. Latin American Agribusiness Development,* 711 F.2d 989, 995 (11th Cir. 1983). Generally, a request for dismissal for the failure to state a claim "is viewed with disfavor, and is rarely granted." *Lone Star Industries, Inc. v. Horman Family Trust,* 960 F.2d 917, 920 (10th Cir. 1992) (citing *Sosa v. Coleman,* 646 F.2d 991, 993 (5th Cir. 1981)). If the evaluation of the request for Rule 12(b)(6) relief requires consideration of matters outside of the initial pleadings, the court is required to convert the motion to one under Rule 56(c) for summary judgment and permit the submission of evidence on the matters asserted. Fed. R. Civ. P. 12(b)(6).

While Denison only specifically identifies Fed. R. Civ. P. 12(b)(6) as a basis for proceeding in his Motion, it is apparent that his Motion addresses this Court's jurisdiction to proceed in this case. Such allegations implicate Fed. R. Civ. P. 12(b)(1) and (2), which address dismissal for lack of subject matter and personal jurisdiction. Motions made under these sections of Rule 12(b) are classified under two forms: (1) "a facial attack on the complaint's allegations as to subject matter jurisdiction [which] questions the sufficiency of the complaint" and (2) a "challenge [to] the facts upon which subject matter jurisdiction depends." *Holt v. United States*, 46 F.3d 1000, 1002-3 (10th Cir. 1995) (citations omitted). Under the former, a court must accept the allegations in the complaint as true, while under the latter, a court cannot presume the truthfulness of the complaint's factual allegations. *Id.* Therefore, when the motion represents a challenge to the jurisdictional facts alleged in the complaint, "[a] court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.* at 1003. This does not result in the conversion of the motion to one for summary judgment under Fed. R. Civ. P. 56(c). To the extent that examination of the facts are necessary to determine this Court's jurisdiction, all factual disputes related to jurisdiction will permit this Court to review the attachments provided with the pleadings and this Court will indicate herein should reliance upon evidence outside of the initial pleadings be necessary. Otherwise, this Court will limit its examination to the pleadings themselves under the scrutiny required by the controlling legal authorities.

The first area of contention surrounds the authority under which Denison acted when he arrested Dry. In order to state a *Bivens* claim,[3] Plaintiffs "must allege circumstances sufficient to characterize [Denison] as [a] federal actor[ ]." *Romero v. Peterson*, 930 F.2d 1502, 1506 (10th Cir. 1991) (citing *Reuber v. United States*, 750 F.2d 1039, 1056-57 (D.C. Cir. 1984)). Thus, this Court need only determine whether Denison was acting under color of federal law and, if he was not acting pursuant to federal law, it is not essential to the outcome of this case for this Court to determine under pursuant to what law that Denison acted. So long as it was not federal law, a *Bivens* action cannot be maintained. Indeed, Denison may have acted under color of no recognized legal authority at all.

Dry bases his contention that Denison was acting pursuant to federal law upon the conclusion that neither the Choctaw Nation, generally, nor the Choctaw Court of Indian Offenses, specifically, possessed the necessary criminal jurisdiction to arrest and charge Dry.[4] Dry

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[3] *See, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing a cause of action for federal officers violating a party's rights guaranteed by the United States Constitution.) This Court is presuming that Dry is pursuing a *Bivens* claim against Denison, since he failed to dispute Denison's characterization of the claims against him in response to the motion to dismiss.

[4] Count I specifically explains Dry's basis for federal jurisdiction as follows:

> The Choctaw Nation, did not have the authority or the jurisdiction to prescribe the conduct for which the Plaintiff, Douglas G. Dry was arrested, and therefore the actions of the Defendant[ ] Hoppy Denison . . . were pursuant to the authority of the

asserts that after a constitutional crisis in the mid-1980's, a referendum was held for the members of the Choctaw Nation to state whether the Nation's "tribal court's jurisdiction [would] be extended to include general civil, criminal and probate matters." The members voted not to extend the tribal court's jurisdiction as outlined in the referendum. As a result, the Choctaw Nation Constitution provides in relation to the jurisdiction of the tribal courts "[t]he Tribal Court shall have exclusive jurisdiction to decide disputes, by vote of two (2) members, arising under any provision of the Constitution or any rule or regulation enacted by the Tribal Council."[5] Later, the Choctaw Nation contracted with the Bureau of indian Affairs to provide what is commonly referred to as a "C.F.R. Court" or "Court of Indian Offenses," or a system to administer justice for the Choctaw Nation.[6] In the particular contract in question, the court is referred to by interlineation as the "Tribal Judicial Court System." Because the Nation's tribal court does not possess the requisite criminal jurisdiction to consider the charges for which Dry was arrested as a result of the referendum and Choctaw Constitution, Dry reasons that Denison could not have been acting under color of tribal law when he performed the acts set forth in the Amended Complaint which form the basis of this action. Consequently, Dry

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Bureau of Indian Affairs which places this conduct directly under the Constitution of the United States. Para. 56.

[5] *See*, Constitution of the Choctaw Nation of Oklahoma, Art. XIII, Sect. 1.

[6] Specifically, 25 C.F.R. § 11.100 *et seq.*

concludes that Denison must have been acting under color of federal law, thereby placing his actions under the umbrella of protections afforded Dry by virtue of the United States Constitution and the United States Supreme Court through its ruling in *Bivens*.

Without question, Indian tribes are recognized as sovereign entities, with "inherent powers of a limited sovereignty" because of "[t]heir incorporation within the territory of the United States, and their acceptance of its protection . . . " *United States v. Wheeler*, 435 U.S. 322-23 (1978). Among the powers inherently reserved to each Indian tribe as a part of their "right to internal self-government," including the Choctaw Nation, is the ability to enforce the tribe's criminal laws against tribe members. *Id.* at 322 (citations omitted). This inherent attribute of tribal sovereignty may only be abrogated by specific treaty or act of Congress and was not "within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status." *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975) (citing *United States v. Mazurie*, 95 S.Ct. 710, 717-18 (1975)) (remaining citation omitted); *United States v. Wheeler*, 435 U.S. at 326. As succinctly stated by a recognized authoritative treatise on Indian law, "[a]n Indian tribe may exercise a complete (criminal) jurisdiction over its members and within the limits of the reservation subordinate only to the expressed limitations of federal law." F. Cohen, *Handbook of Federal Indian Law* 148 (1942 ed.). Thus, this Court starts

with the proposition that the Indian tribes are empowered with criminal jurisdiction over its members.[7]

In order to alter this proposition, Dry must identify a treaty or act of Congress which took this inherent right away. In short, he does not.[8] To the contrary, in response to certain rulings of the United States Supreme Court,[9] Congress amended the Indian Civil Rights Act in 1991 to make clear that the "powers of self-government" includes "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. §1301(2). Further, simply because Congress has the right "to regulate the manner in which

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[7] As Dry notes in his Amended Complaint, he is "a citizen of the Choctaw Nation of Oklahoma . . . " *See*, Amended Complaint filed April 23, 1997 at para. 4.

[8] Dry does state that the limitation on criminal jurisdiction in the Choctaw Nation "is not found in federal statutes or treaties, rather it is found embedded in the history of the Choctaw Constitution." *see*, Plaintiffs' Response to Defendant Kim Reed's Motion to Dismiss filed July 14, 1997 at p. 4 (since all responses are incorporated by reference, it is presumed the response to Reed's motion is included). This Court finds no precedent for the proposition that a restriction on the inherent criminal jurisdiction of an Indian tribe can originate from any other source than a treaty or act of Congress.

[9] Specifically, the case of *Duro v. Reina*, 495 U.S. 676 (1990), wherein the Supreme Court found that Indian tribes did not possess inherent criminal jurisdiction over non-Indians who allegedly commit offenses contrary to Indian law. Congress, in its amendment to the Indian Civil Rights Act, included an apparent attempt to expand the definition of an "Indian" to include a person committing an offense recognized in 18 U.S.C. § 1153 in Indian country, thereby presumably placing a non-Indian that commits such an offense under the criminal jurisdiction of the Indian tribal court.

the local powers of the [Indian tribes] shall be exercised does not render such local powers federal powers arising from and created by the constitution of the United States." *Talton v. Mayes*, 163 U.S. 376, 384 (1896). Thus, federal court jurisdiction is not derived somehow from the fact that the Federal government provided for the establishment of Courts of Indian Offenses for the purpose of providing "adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise that jurisdiction." 25 C.F.R. §11.100(b). The jurisdiction exercised is still tribal jurisdiction. *Tillett v. Lujan*, 931 F.2d 636, 640 (10th Cir. 1991). To accept Dry's proposition, members of an Indian tribe could transfer criminal jurisdiction from a tribal court to a federal court by simply voting to do so by referendum, with no congressional grant of authority. Federal jurisdiction is not so easily conferred.

Dry argues that if he is not permitted to proceed in this Court he will be denied a judicial forum in which to air his claims, because the Choctaw Court of Indian Offenses does not have jurisdiction over federal or state officials that it could not exercise if it were a tribal court and because of the limitation in the Choctaw Constitution upon the court's jurisdiction. Dry assumes that Denison acted as a federal officer, thereby implicating the restriction upon Courts of Indian Offenses under 25 C.F.R. §11.104(a). Under Dry's theory throughout this action, Denison acted as a federal officer only because the Court

of Indian Offenses lacked criminal jurisdiction to entertain the criminal charges brought against Dry. This circular argument brings this Court back to the proposition that the Choctaw Nation and its tribal court possesses inherent criminal jurisdiction and, therefore, Denison did not act pursuant to federal law in taking the actions on September 4, 1995. Additionally, this Court does not agree that the Choctaw Constitution restricts that tribal courts from exercising all criminal jurisdiction, since it provides for the "exclusive jurisdiction" of the tribal courts over any provision of the Choctaw Constitution and "any rule or regulation enacted by the Tribal Council." This statement would presumably include criminal regulations promulgated by the Tribal Council.

Dry also states that he is effectively prevented from exhausting his remedies available in tribal court because the statute of limitations for civil actions was altered in 1994 to six months and he could not proceed through the claims process under the Federal Tort Claims Act and bring an action in tribal court within this period of time. Again, Dry presumes that Denison was acting as a federal agent, thereby requiring a claim to be brought in accordance with the Federal Tort Claims Act, an issue that is very much in question. In any event, any challenge to the jurisdiction of a tribal court should be conducted in the first instance in the tribal court itself. *Tillett*, 931 F.2d at 640. The only exceptions to this proposition are (1) where the tribal court lawsuit "is motivated by a desire to harass or is conducted in bad faith; (2) where the action is "patently violative of express jurisdictional prohibitions;" or (3) where "exhaustion would be futile because of the lack of an adequate opportunity to challenge the Court's

jurisdiction." *National Farmers Union Co. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985). Dry has not demonstrated the existence of any of these circumstances such that his action should not have been brought in tribal court in the first instance. Consequently, Dry's arguments in this regard are rejected.[10]

Alternatively, Dry contends that, if Denison was acting as a tribal officer, he is not immune from suit for his actions. Dry recognizes the sovereign immunity of an Indian tribe and its officials. *Santa Clara Pueblo v. Martinez*, 98 S.Ct. 1670 (1978). However, Dry contends that the tribe's sovereign immunity does not apply to this situation because access to the tribal court was denied in another case, therefore the exception to sovereign immunity found in *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), comes into play. Dry must have attempted to gain access to the Choctaw Court of Indian Offenses with this case and not rely upon a blanket interpretation of a prior court decision on a wholly unrelated matter. This Court rejects the application of the *Dry Creek Lodge* exception as urged by Dry and finds that, if Denison was acting as a tribal officer, he shares in the Choctaw Nation's sovereign immunity.

Dry also attempts to base jurisdiction upon whether Denison acted as a federal officer during the events of September 4, 1995. A party is only a federal actor "if they act jointly with, under the direction of, or on behalf of the federal government." *Romero*, 930 F.2d at 1507 (citing *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1429 (10th Cir.

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[10] Since this Court has found that Dry has failed to state a cognizable federal claim, we need not reach the issue of Plaintiffs' forum for civil grievances in this Order.

1984)). The party whose conduct is questioned must have been acting as "employees or agents of the federal government, or must have been using their federal badges or other indicia of authority in furtherance of the business of another entity or person." *Id.* However, Dry specifically states in the Amended Complaint that the basis of federal jurisdiction is the lack of tribal jurisdiction. The requirement for *Bivens* liability to attach is that Denison was acting in some capacity as federal officers either directly, with conferred federal authority to do so, or indirectly, in acting at the direction of a federal officer. Dry has not alleged either to be the case, in the Amended Complaint or in his response. Consequently, this argument is without basis.

This Court need not and will not determine whether the action taken in the referendum which culminated in the current form of the Choctaw Constitution and the state of criminal jurisdiction of the Court of Indian Offenses was a valid and effective declination of jurisdiction, given the inherent criminal jurisdiction granted the Choctaw Nation by virtue of its tribal sovereignty. Suffice it to say that the narrow ruling stated by this Court today is limited to whether Denison acted under color of federal law during the course of the events forming the basis of this action and that this Court concludes, based upon the legal authority available, he did not.

IT IS THEREFORE ORDERED that Defendant Hoppy Denison's Motion to Dismiss filed July 11, 1997 (Docket Entry #116) is hereby GRANTED. Accordingly, Counts I, II, and VI asserted against Defendant Denison, in both his official and individual capacities are hereby DISMISSED.

IT IS SO ORDERED this 30th day of September, 1998.

APPENDIX M

FEDERAL STATUTORY PROVISIONS INVOLVED

25 U.S.C. § 1303 (1994)

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

25 U.S.C. § 2241 (1994)

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having Jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

APPENDIX N

TRIBAL STATUTORY PROVISIONS INVOLVED

CB [Council Bill] 138-91

IN THE TRIBAL COUNCIL
OF THE CHOCTAW NATION

August 10, 1991

A COUNCIL BILL

TO AMEND Council Bill CB 040-91, approving contracting of the Bureau of Indian Affairs Law Enforcement Program.

Whereas, CB 040-91, dated January 12, 1991, originally approved contracting of the Law Enforcement Program, and

Whereas, CB 074-91, dated March 9, 1991, amended CB 040-91, and

Whereas, CB 079-91, dated April 13, 1991, amended CB 040-91, and

Whereas, the Bureau of Indian Affairs Area Office in Muscogee has requested that CB 040-91 be amended further to include the following language, and

Whereas, the approving resolution will be in effect until such time as the governing body shall rescind the resolution, and

Whereas, the Choctaw Nation is adopting 25 CFR Part 11 with the following proviso to Section 11.55:

Provided, however, this section shall not apply to any establishment owned and operated by the Choctaw Nation of Oklahoma on Tribal land; and

Whereas, the above shall be considered as the Tribal Criminal and Civil Code until such time as the Choctaw Nation as the Choctaw Nation adopts an alternative code,

THEREFORE BE IT ENACTED by the Tribal Council of the Choctaw Nation of Oklahoma that this Act be cited as approval for amendment of CB 040-91, contracting the Law Enforcement Program.

CB [Council Bill] 111-92

IN THE TRIBAL COUNCIL
OF THE CHOCTAW NATION

April 19, 1992

A COUNCIL BILL

APPROVAL TO CONTRACT the CFR Court, Court of Indian Offenses, established by 25 CFR, Part 11.

Whereas, the Choctaw Nation has demonstrated the knowledge and ability to administer Tribal programs, and

Whereas, the Choctaw Nation has contracted and is currently operating the Law Enforcement Program, and

Whereas, the Tribal Council authorizes the Chief of the Choctaw Nation or persons to whom the Chief has delegated the authority to

negotiate and/or execute the Contract and any amendments thereto, and

Whereas, the Tribal Council recognizes the commencement of the Contract term to be immediately following contract negotiations, and

Whereas, the Tribal Council recognizes that authorities granted under this Council Bill shall remain in effect until such time that the Tribal governing body takes contrary action to the provisions contained herein,

BE IT ENACTED by the Tribal Council of the Choctaw Nation of Oklahoma that this Act be cited as approval to contract the CFR Court, Court of Indian Offenses, under the conditions described herein.

APPENDIX O

TRIBAL CONSTITUTIONAL PROVISION INVOLVED

Choctaw Constitution art. XIII

Article XIII – Privileges, Duties and Powers of Judicial Department

Section 1. The Tribal Court shall have exclusive jurisdiction to decide disputes, by vote of two (2) members, arising under any provision of this Constitution or any rule or regulation enacted by the Tribal Council.

Section 2. Rules of procedure for the Tribal Court shall be prescribed by the Tribal Council and shall insure the members due process of law.

Section 3. The decision of the Tribal Court shall be final.